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Supreme Court of the United States

October Term, 1930

No. 235

EDWARD F. FLYNN, AS EXECUTOR OF THE ESTATE OF EDWARD L. FLYNN, DECEASED,

Petitioner,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

BRIEF ON BEHALF OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Opinions of the Courts Below

The Memorandum of Decision on Demurrer, of Judge Ells of the Superior Court of New Haven County, is to be found at pages 4 to 7 of the Record.

The Supreme Court of Errors of Connecticut found no error, Chief Justice Wheeler writing the opinion. 111 Conn. 196, (R., 9-14).

Jurisdiction of This Court

(a) The jurisdiction of this Court is sought to be invoked under Section 237 of the Judicial Code, as amended, Subdivision (b) (43 Stat. 937).

(b) The judgment sought to be reviewed is dated March 31, 1930 (R., 14, 15). The present petition was filed in this Court on the 28th day of June, 1930.

(c) This case was brought under the Federal Employers' Liability Act (Act of April 22, 1908, c. 149, § 1, 35 Stat. 65), to recover damages for pecuniary loss by reason of the death of petitioner's decedent (R., 1-3).

Defendant's demurrer to the complaint was sustained and the complaint adjudged insufficient (R., 7). This judgment in the Superior Court of New Haven County was confirmed and established by the Supreme Court of Errors of Connecticut (R., 14, 15).

"The defendant demurred to the complaint which was dated May 15, 1929, upon the principal ground, stated in several forms, that the injury to the decedent having occurred on December 4, 1923, and the death having occurred on September 1, 1928, the plaintiff's action which was brought to recover for pecuniary loss to the widow and children of the decedent under the Federal Employers' Liability Act of April 22, 1908, Chapter 149, Section 6 as amended by the Act of April 5, 1910, Chapter 143, is barred, since by it no cause of action ever accrued to the plaintiff." (R., 3, 4, 9, 10).

(d) Cases believed to sustain the jurisdiction of this Court are:

Mellon v. *Goodyear*, 277 U. S. 335
Reading Co. v. *Koons*, 271 U. S. 58

Statement of the Case

This action was brought under the Federal Employers' Liability Act (*supra*), for pecuniary loss to the widow and children of the deceased (R., 1-3).

The accident occurred December 4, 1923, the death September 1, 1928, and the complaint is dated May 15, 1929 (R., 1-3).

Question Presented

Whether under the Federal Employers' Liability Act, in an action for a wrongful death occurring more than two years after the accident from which it is alleged to have resulted, any right of action ever accrued to the plaintiff, the decedent's executor, where the decedent had never brought suit on such accident; whether the termination of the decedent's cause of action by the lapse of more than two years between the date of the accident and the date of death, prevented any action for his death from arising in favor of his dependents.

Argument

The petition for writ of certiorari should be granted:

(1) The Supreme Court of Errors of the State of Connecticut has decided an important question of Federal law which has not been, but should be, settled by this Court.

(2) There is the need of a final decision in respect of the question presented.

(3) To obtain this final decision is obviously important to injured employees, to dependents of employees fatally injured, and to railroads.

While the respondent considers its position, and the decisions of the two state courts, correct, it joins in the petition for a writ of certiorari for the reasons given.

It is to be noted that the complaint makes no claim for damage on account of injury of the deceased employee so that we need not here concern ourselves with section 2 of the Act of April 5, 1910, c. 143, 36 Stat. 291.

The Act of April 22, 1908, c. 149, § 1, 35 Stat. 65, reads as follows:

"That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The Act of April 22, 1908, c. 149, § 6, 35 Stat. 66, as amended by the Act of April 5, 1910, c. 143, § 1, 36 Stat. 291, reads in part as follows:

"No action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued."

The only Federal case with similar facts is *Rodgers v. Pennsylvania R. Co.*, 19 Fed. (2) 522 (District Court, E. D. New

York, 1927), where the accident occurred November 10, 1922, the death February 4, 1925, and the action was brought December 2, 1926. The motion to dismiss the complaint was granted because no right of action existed in the deceased immediately preceding his death. There is language in *Mich. Cent. R. R.* v. *Vreeland*, 227 U. S. 59, 70 which supports our contention but the question was not involved. Nor did the precise point arise in *Chicago, Burlington & Quincy R. R.* v. *Wells-Dickey Trust Co.*, 275 U. S. 161.

In *Reading Co.* v. *Koons, supra*, the date of the accident was April 22, 1915, the death April 23, 1915, and the action was begun February 6, 1922, five months after administration had been taken out. This Court held that the date of the death was the date of accrual.

In *Mellon* v. *Goodyear, supra*, the accident was July 31, 1919, the settlement March 16, 1920, the death May 4, 1920, the suit April 19, 1921. This Court held that the settlement relieved the Director General from all liability.

Williams v. *Mersey Docks & Harbour Board*, [1905] 1 K. B. 804 is authority for our position. In this country, in the state courts, we find *Kelliher* v. *N. Y. C. & H. R. R. Co.*, 212 N. Y. 207; *Williams* v. *Alabama Great Southern Ry. Co.*, 158 Ala. 396.

There is attached to the right of action by the personal representative the implied statutory condition that, at the time of the employee's death, he had a right of action that could be enforced. To hold otherwise would be to read into the statute an intent to create a liability to the dependents when there was none to the deceased at the time of death.

In respect of this problem it is difficult to see any legal distinction between a judgment, a settlement, and a lapse of the statutory period.

Conclusion

We respectfully submit that the present petition should be granted.

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FLEMING JAMES, JR.,
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